UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

CHRISTINE DAVIGNON CASE,	***)***	
	)	
Petitioner	***)***	
	)	
	)	***Civil Docket No. 96-237-P-H***
	)	
JAMES CLEMONS,	***)***	
Superintendent,	***)***	
Maine Correctional Center,	***)***	
	)	
Respondent	***)***	

RECOMMENDED DECISION ON PETITION FOR WRIT OF HABEAS CORPUS

The petitioner seeks a writ of habeas corpus pursuant to 22 U.S.C. § 2254 in connection with her conviction in the Maine Superior Court (Cumberland County) (Criminal Docket No. CR-92-999) on charges of burglary, armed robbery and kidnapping. Her *pro se* petition alleges prosecutorial misconduct at trial. I recommend the court deny the petition.

I. Background

Following the grand jury's return of an indictment alleging the above-referenced offenses, the case against the petitioner proceeded to jury trial in July 1994. Docket Record, at 1, 6. The jury returned verdicts of guilty on all three counts, and judgment was entered on December 22, 1994.[1] Docket Record at 6, 8. The trial court sentenced the petitioner to concurrent sentences of ten years

[1] Although the indictment charged the petitioner with Class A kidnapping, by the time the jury returned its verdict the charge had been reduced to a Class B offense -- apparently because the state determined that the petitioner had released her victim alive, without bodily injury, in a safe place. Response at 2 n.2; *see* 17-A M.R.S.A. § 301(3) (providing for reduction of offense to class B in these circumstances).

on the burglary and robbery counts and five years on the kidnapping count. *Id*. at 8. The Law Court affirmed on direct appeal, concluding, *inter alia*, that "no error, much less obvious error," deprived her of a fair trial as a result of statements made by the state in its closing argument. *State v. Case*, 672 A.2d 586, 589 (Me. 1996). In so doing, the court explicitly cited M.R.Crim. P. 52, which in relevant part provides that "[o]bvious errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the [trial] court." *Case*, 672 A.2d at 589. The Law Court's mandate was entered on the docket of the Superior Court on March 5, 1996.[2] Docket Record at 9. The petitioner sought habeas corpus relief in this court on July 29, 1996, and remains incarcerated at the Maine Correctional Center.

II. Discussion

The petitioner asserts four separate grounds for relief. The first she characterizes as "prosecutorial misconduct," asserting that the prosecutor donned the actual clothes worn by the petitioner at the crime scene, assumed a crouched position and then "pointed the actual gun involved in the case in the direction of the jury." Petition (Docket No. 2) at 5. The second ground, which she describes as "derogation of the law," complains of two references by the prosecutor in closing argument to the law as "mumbo jumbo," as well as "further denigrating statements by the prosecutor concerning 'attorneys and psychologists' attempting to 'trap' and 'confuse' the jury." *Id*. Third, under a ground she describes as "voluntariness of statements," the petitioner complains that the prosecutor improperly characterized as "voluntary and legally obtained" two statements made by the petitioner to police. *Id*. at 6. Finally, the petitioner contends that she is entitled to relief because the

[2] The Law Court separately denied the petitioner's request for leave to appeal her sentence. Docket Record at 9. The issues raised therein are not at issue here.

prosecutor read the jury a quote from the Law Court's opinion in *State v. Mishne*, 427 A.2d 450 (Me. 1981). According to the petitioner, this was improper because it presented the jury with an incorrect statement of Maine law concerning the issue of compulsion. Compulsion was the heart of the petitioner's defense at trial, since she did not deny her presence at the scene of the charged offenses but took the position that her husband, also present at the scene, forced her to participate. *See, e.g.*, Trial Transcript at 22-23 (opening statement by defense counsel).

It is the respondent's position that all of the petitioner's claims are not cognizable on habeas review because they are procedurally defaulted. A procedural default — that is, a petitioner's failure to comply with the state court's procedures for raising the issue — constitutes an independent state-law ground that places the conviction beyond the reach of habeas corpus relief, "unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *see also Gilday v. Callahan*, 59 F.3d 257, 273 (1st Cir. 1995) (citations omitted), *cert. denied*, 116 S.Ct. 1269 (1996). "Where a state court decision rests on a petitioner's failure to comply with a contemporaneous objection rule at the time of trial, this constitutes an adequate and independent ground." *Magee v. Harshbarger*, 16 F.3d 469, 471 (1st Cir. 1994) (citation omitted). However, the procedural default rule applies only when "the last state court rendering a judgment in the case clearly and expressly states that its judgment rests on a state procedural bar." *Harris v. Reed*, 489 U.S. 255, 263 (1989) (citations and internal quotation marks omitted).

The Law Court's opinion does not clearly and expressly state that it disposes of the petitioner's claim of error based on a procedural default. To the contrary, the Law Court clearly and

expressly stated that it found no error notwithstanding any violation of the contemporaneous objection rule. The fact that the Law Court explicitly invoked M.R.Crim. P. 52 does not change the result. That rule simply authorizes state tribunals to take note of errors affecting substantial rights that were *not* the subject of a contemporaneous objection. Moreover, a review of the trial transcript reveals that at least some of the claimed errors were, in fact, the subject of a contemporaneous objection — at least insofar as counsel for the petitioner brought them to the attention of the trial court, outside the presence of the jury, following the closing arguments and the court's instructions. *See* Trial Transcript at 521-22, 524-25, 526-27.

Although properly before the court, the petitioner's request for habeas corpus relief must be dismissed for lack of merit. The court is authorized to grant the requested relief "only on the ground that [s]he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). As the state points out, the petition is facially deficient in that it fails to specify which constitutional provision, federal statute or treaty is implicated by the prosecutorial conduct of which the petitioner complains. The state, reasonably, assumes that whatever federal argument the petitioner is making is the same one she made to the Law Court.[3] Indeed, any other argument would likely require dismissal for failure to exhaust state-court remedies. *See* 28 U.S.C. § 2254(b)(1)(A) and (c) (issues still cognizable in state-court proceeding not proper basis for habeas corpus relief). So construed, the petitioner's asserted ground is that the alleged misconduct of the prosecutor deprived her of her right to due process as secured by the Fifth and Fourteenth Amendments to the Constitution.

[3] The petitioner made her argument to the Law Court through counsel, whose assistance she does not contend was ineffective.

In opposing this contention on the merits, the state takes the position that the prosecutor's conduct measures up to the constitutional standard set forth in the four federal cases cited to the Law Court by the defendant, chief among them *Berger v. United States*, 295 U.S. 78 (1935). This is the case that contains the Supreme Court's famous observation that a prosecutor may "strike hard blows . . . [but] is not at liberty to strike foul ones." *Id*. at 88. In that instance, the foul blows requiring vacation of the conviction were statements by the prosecutor suggesting he had personal knowledge that was at variance with the sworn testimony presented to the jury. *Id*. at 87 (characterizing these remarks as "undignified and intemperate, containing improper insinuations and assertions calculated to mislead the jury").

Also relied upon by the petitioner in state court was *United States v. Boldt*, 929 F.2d 35 (1st Cir. 1991). In that case, the prosecutor made the following remark in closing argument: "Ladies and gentlemen, it's a favorite defense tactic to try to get you to focus on unnecessary facts or to get you emotionally wrapped up with the defendant." *Id*. at 40. Defense counsel objected, the trial court sustained the objection, but the court denied the motion for a mistrial and instead gave a curative instruction. *Id*. The First Circuit sharply criticized the "impropriety" of a prosecutor "casting suspicion not merely on a defense possibly employed by this defendant but on the role of defense counsel in general," but determined that the curative instruction "sufficed to dispel any prejudice from the improper comment." *Id*. at 40-41 (citation omitted).

Likewise, the petitioner has relied on *Arrieta-Agressot v. United States*, 3 F.3d 525 (1st Cir. 1993). This was a drug prosecution involving Coast Guard interdiction; in his closing argument the prosecutor repeatedly referred to the defendants' alleged lack of concern for the effect of marijuana on youth. *Id.* at 527. He referred to the Coast Guard as "protecting the people" and "protecting the

youth," continuing:

> That is why, ladies and gentlemen of the jury, they were in the drug interdiction. To save you all from the evil of drugs. Because the defendants are not soldiers in the army of good. They are soldiers in the army of evil, in the army which only purpose [sic] is to poison, to disrupt, to corrupt.

Id. Despite the lack of a contemporaneous objection to these remarks, the First Circuit vacated the convictions for plain error given the risk that the prosecutor's comments "would excite the jury, invite a partisan response and distract its attention" from the question of the defendants' guilt or innocence. *Id*. at 528, 529-30.

Finally, the petitioner cited *United States v. Whiting*, 28 F.3d 1296 (1st Cir. 1994), a drug prosecution which involved two prosecutorial statements to which contemporaneous objections were not made and one to which timely exception was taken. *Id*. at 1302-03. In the former category was a comment that one defendant "brought the kids of Roxbury the guns, the drugs, the violence" followed by the prosecutor imploring the jurors not to "let other kids be succored [sic] in by that flash, that cash, that deception." *Id*. at 1302. Also not objected to was the prosecutor's comment in rebuttal that the closing arguments presented by defense counsel were "smoke screens." *Id*. The remarks to which a contemporaneous objection was interposed involved the prosecutor's comment that "[a]n attack on me and my colleagues and our ethics and our approach to this case not only [is] an affront to me personally, but a smoke screen."[4] *Id*. at 1303. As to the latter comment, the court found no reversible error owing to this "isolated remark" that had been the subject of a curative instruction from the trial judge. *Id*. As to the statements to which no contemporaneous objection

[4] The First Circuit also discussed a fourth remark -- involving the prosecutor's correcting a discrepancy in a demonstrative exhibit. *Whiting*, 28 F.3d at 1303. The court agreed this amounted to testimony by the prosecutor, but dismissed the "misstep" as "trivial." *Id*.

was made, the First Circuit reviewed for plain error and found none. *Id*. at 1302-03 (criticizing prosecutor's reference to "other kids," but noting it had not "so poisoned the well that the trial's outcome was likely affected") (quoting *Arrieta-Agressot*, 3 F.3d at 528).

The prosecutorial conduct complained of in the instant petition does not run afoul of the standards set out in these cases, nor any others of which I am aware concerning the conduct required of prosecutors by the Constitution. The prosecutor's use of the petitioner's clothing, and the gun entered into evidence at trial, as props in her closing argument strikes me as advocacy that borders on the overzealous, but I cannot say it runs afoul of any constitutional standard.[5] It is apparent that the prosecutor was endeavoring to convince the jury it would be illogical to determine that a person so dressed had not formed the requisite intent in the circumstances. Thus, while this mode of

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[5] The trial transcript reflects some disagreement, in discussions with the trial judge, over whether the prosecutor pointed the gun directly at the jury or simply in the general direction of the jury box. Trial Tr. at 523. The trial judge's finding was that the prosecutor did not point the weapon directly at the jurors. *Id*. at 524. Even if she had, my recommendation would be the same.

Further, although it is not readily apparent from the trial transcript at what point the prosecutor took the actions complained of, I credit the assertion of the petitioner made in her brief to the Law Court that this demonstrative use of evidence took place in the portions of the rebuttal argument appearing at pages 496-97 of the transcript. What the prosecutor was saying to the jury at the time was this:

> [T]he reasonable inferences you can draw from a person wearing a pair of gloves are different when that person is then also wearing a mask with holes cut out of it for eyes. Am I wearing gloves to wash dishes? Am I wearing gloves to disguise my identity and avoid proof of my identity?
>
> And when I put a camouflage hat on my head and I wear a bulky jacket, am I doing that because my head is cold or are my arms cold? Or am I doing that so you won't know who I am?
>
> And when I do all of that and I point a gun at you, do you think I'm doing it because I'm chilly? Or do you think I'm doing it because I want to scare the hell out of you and I don't want you to know who I am?

Trial Tr. at 496-97.

argumentation admittedly has the potential to distract the jury by evoking juror's fear of being terrorized by an armed burglar, the challenged comments at least have the virtues of relevance and basis in the record-- in contrast to the statements that led to vacated convictions in the federal cases cited by the petitioner before the Law Court.

The prosecutor's references to "mumbo jumbo"[6] likewise do not reach the level of implicating any constitutional protections. Again, they are perhaps intemperate comments, coming as they did from a practitioner whose employment requires her to test allegedly criminal conduct against the elements of the offenses set forth in the applicable criminal statutes. But, viewed in context, they suggest only something that must have been obvious to the jury: that the criminal law can be technical and complex.

As to the prosecutor's statement that the petitioner contends improperly denigrated attorneys and psychologists, I find noting improper. What the prosecutor said was this:

> [D]on't fall into the trap that lawyers and psychologists so often want to set for you, that they know better, that this is just too confusing for you to figure out. You were chosen as jurors because you can, because you can act in an unbias[ed] way, putting aside sympathy or prejudice. You can look at the evidence in this case and you can decide what is worthy of belief and what is not.

Trial Tr. at 503. This strikes me as a correct statement of the jury's role, albeit with a prosecution-friendly spin. Rather than denigrate attorneys or expert witnesses such as psychologists, it simply

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[6] The record reflects that the prosecutor made the following remark in her closing argument by way of introducing the concept of lesser included offenses to the jury: "I won't go into the sort of legal mumbo jumbo about that but I want to show you how lesser included offenses fit in here." Trial Tr. at 461. She then went on to explain that "kidnapping under Maine law is [the] lesser included offense of criminal restraint plus an added concept of intent." *Id.*

Several pages later in the transcript appears the prosecutor's second use of the disputed phrase. At the conclusion of her discussion of the elements of the charged offenses, she stated: "Enough lawyer mumbo jumbo, let's talk about the facts." *Id.* at 466.

reminds the jurors that they are competent to decide matters -- such as criminal intent -- that include dimensions that have been the subject of learned discourse by attorneys and psychologists.

Next, the petitioner contends that the prosecutor committed misconduct by suggesting to the jury that certain statements made by the petitioner to the police were voluntary when, in fact, the court suppressed them on voluntariness grounds. The brief submitted by the petitioner to the Law Court suggests that the prosecution was able to make use of certain of these suppressed statements because they had been the basis of certain opinions offered by the petitioner's expert. *See* Appellant's Brief, *State v. Case*, at 5-6, 7, 10, 20-22. The trial transcript confirms this, and reflects that both the petitioner and her attorney affirmatively opted to present evidence of these statements -- both to support the expert's opinions and, more generally, to shed light on the petitioner's state of mind as relevant to her asserted defenses -- after being warned that such a decision would "open the door" to the use of these statements by the prosecution for any purpose. Trial Tr. at 102-09. The present contention relates not to the propriety of the trial court's evidentiary rulings, but rather to the prosecutor's assertion before the jury that the statements at issue were voluntary. Assuming that this was an inaccurate statement, neither the petitioner nor the brief submitted by her attorney to the Law Court offer any insight into why this deprived her of a fair trial. The petitioner was presumably free at trial to put these statements in their proper context. That the statements were not voluntary as that term is defined for purposes of suppression motions is of some significance, but not of such central importance as to make the prosecutor's misstatement taint the entire process.

Finally, as to the petitioner's contention that the prosecutor misstated Maine law by reading an excerpt from the Law Court's *Mishne* opinion, it suffices to say that the Law Court is the best and final arbiter of whether a statement made by a prosecutor is a correct statement of Maine law.

Therefore, the Law Court's determination that there was no error in this statement is dispositive of the issue here.

III. The Motion to Amend and to Appoint Counsel

Subsequent to the state's response, the petitioner filed a motion to amend her petition and for appointment of counsel. Her motion does not specify the nature of the amendment she wishes to present. A logical inference from her motion is that she simply hopes any attorney appointed by the court would present the same grounds in an amended petition, but with more expertise than she is able to muster *pro se*.

In my judgment, the grounds presently invoked by the petitioner and fully presented to the Law Court by her attorney are not meritorious. Therefore, the interests of justice do not require the appointment of counsel given the present state of the proceeding. *See* 18 U.S.C. § 3006A(a)(2) (providing for appointment of counsel in habeas corpus cases when "the interests of justice so require"). Accordingly, I deny the motion for leave to amend the petition and for appointment of counsel.

IV. Conclusion

For the foregoing reasons, I recommend that the petition for a writ of habeas corpus be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 18th day of February, 1997.

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David M. Cohen
United States Magistrate Judge